Supreme Court, U.S.
FILED
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No. 09-212

In The

Supreme Court of the United States

ROBERT H. LENHAM,

Petitioner,

v.

DISABLED AMERICAN VETERANS,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
Of The State Of New Mexico

SUPPLEMENTAL APPENDIX

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
January 15, 2009

NO. 31,390

ROBERT H. LENHAM,

Plaintiff-Petitioner,

v.

DISABLED AMERICAN VETERANS,

Defendant-Respondent,

and

J. EDWARD HOLLINGTON & JOHN L. LOESCHEIN [sic], **TIMOTHY L. BUTLER & GARY L. RICHARDSON, and RICHARDSON LAW FIRM, P.C.,**

Real Parties in Interest.

ORDER

WHEREAS, this matter came on for consideration by the Court upon Motion for Reconsideration and the Court having considered said motion, and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the motion for reconsideration is DENIED.

IT IS SO ORDERED.

WITNESS, The Hon. Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 15th day of January, 2009.

(SEAL) /s/ Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

THE SUPREME COURT OF THE STATE OF NEW MEXICO
November 26, 2008

NO. 31,390

ROBERT H. LENHAM,

Plaintiff-Petitioner,

v.

DISABLED AMERICAN VETERANS,

Defendant-Respondent.

and

J. EDWARD HOLLINGTON & JOHN L. LOESCHEIN [sic], TIMOTHY L. BUTLER & GARY L. RICHARDSON, and RICHARDSON LAW FIRM, P.C.,

Real Parties in Interest.

ORDER

(Filed Dec. 2, 2008)

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeals number 27087.

IT IS SO ORDERED.

WITNESS, The Hon. Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 26th day of November, 2008.

(SEAL) /s/ Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ROBERT LENHAM,

Plaintiff-Appellant,

vs.

DISABLED AMERICAN VETERANS,

Defendant-Appellee.

No. 27,087
Santa Fe County
D-0101-CV-96-01601

NOTICE

PROPOSED SUMMARY DISPOSITION

(Filed Mar. 6, 2007)

You are hereby notified that the:

Record Proper

was filed in the above-entitled cause on **January 19, 2007**

This case has been assigned to the ***SUMMARY CALENDAR*** pursuant to Rule 12-210(D) NMRA.

Summary affirmance is proposed.

Note: This is a ***proposal*** of how the Court views the case. It is not a final decision. You now have twenty (20) days to file a memorandum telling the Court any reasons why this proposed disposition should or should not be made.

See Rule 12-210(D) NMRA.

Plaintiff appeals from the district court's final order in his wrongful termination suit against Disabled American Veterans (DAV). Under this order, the district court divided a $300,000 settlement as follows: $92,850.47 to Plaintiff's first attorneys, Timothy Butler and Gary Richardson (Butler/Richardson); $49,996.41 to Plaintiff's second attorneys, J. Edward Hollington and John Loeschen (Hollington/Loeschen); $26,700.52 to DAV as a sanction; and $130,452.60 to Plaintiff. Plaintiff, who had previously paid Butler/Richardson $33,848 in attorney fees and who presumably owed additional fees to subsequent attorneys not addressed by the order, alleges that his net recovery was $62,756.60. The final order was agreed to by DAV, Butler/Richardson, and Hollington/Loeschen, but not agreed to by Plaintiff. [RP 3639-41]

Plaintiff raises six issues related to the allocation of the settlement proceeds. We consider Plaintiff's issues 1, 4, and 5 individually, and consolidate issues 2, 3, and 6.

Issue 1: Plaintiff contends that the record does not contain particularized findings of bad faith sufficient to support the district court's award of a $26,700.52 sanction to DAV. "We entrust sanctions short of dismissal to the sound discretion of the trial court." *Lujan v. City of Albuquerque*, 2003-NMCA-104, ¶ 8, 134 N.M. 207, 75 P.3d 423. "The choice of sanctions for discovery violations lies within the discretion of the trial court, and it will be reversed only for an abuse of discretion." *Alexander v.*

Anderson, 1999-NMCA-021, ¶ 34, 126 N.M. 632, 973 P.2d 884.

> The right to recover attorneys fees from an opposing party as part of the costs did not exist at common law. Allowance of attorneys fees as an item of costs is not allowable in the absence of a statute, rule of court, or some agreement expressly authorizing the taxing of attorneys fees in addition to ordinary costs.

Gurule v. Ault, 103 N.M. 17, 19, 702 P.2d 7, 9 (Ct. App. 1985) (citations omitted). This Court has also recognized a bad-faith exception:

> [A] New Mexico court may award attorney fees . . . when a party shows bad faith by disrupting litigation or hampering enforcement of court orders, or when it is necessary to vindicate judicial authority and make the prevailing party whole for expenses caused by an opponent's obstinacy under circumstances in which the opponent's behavior is characterized by bad faith or vexatious oppression.

State ex rel. New Mexico State Hwy. and Transp. Dept. v. Baca, 116 N.M. 751, 754, 867 P.2d 421, 424 (Ct. App. 1993), *rev'd in part*, 120 N.M. 1, 896 P.2d 1148 (1995) (internal punctuation and citations omitted).

On remand and pursuant to instructions from this Court's memorandum opinion filed April 5, 2004 in Nos. 24,310 and 24,506, the district court in the

present case entered findings of fact and conclusions of law. [RP 3492-3523] The district court's concerns in awarding the $26,700.52 in fees and costs were twofold. First, the district court found that Plaintiff had agreed to settle the case and then backed out of the agreement, necessitating additional litigation to enforce the settlement. Second, the district court found that Plaintiff, in responding to a request for production of documents, had withheld two letters dated February 7 and February 9, 2001 that tended to show he had agreed that the case had been settled at that point in the litigation. In awarding the $26,700.52 to DAV, the district court found that that was the amount of additional attorney fees and costs DAV had incurred in enforcing the settlement and moving for discovery sanctions. *See* findings of fact nos. 58-59. [RP 3513] The court refers to the affidavit of DAV's attorney and their bill of costs as the basis for the specific amount of the sanction. [RP 3100-06, 3115] The court specifically found that under the circumstances, "Lenham's failure to produce the February 7th and February 9th documents suggests bad faith." Finding of fact no. 72. Finally, the court found that the $26,700.52 in attorney fees and costs awarded for the expenses of enforcing the settlement was "sufficient to address the court's concern over the non-production of these documents," and did not award an additional sanction for the discovery violation. Finding of fact no. 73. [RP 3516-17]

We propose to hold that the district court did not err in awarding a sanction of $26,700.52 against Plaintiff in favor of DAV.

Issues 2, 3, and 6: Three of Plaintiff's issues relate to the fairness and amount of attorney fees and charging liens. In our memorandum opinion filed April 5, 2004, we remanded this case to the district court with instructions to "take further evidence and to permit the parties to tender requested findings of fact and conclusions of law." Memorandum opinion, p. 18. [RP 3393] As far as can be determined from the record, the only further evidence taken consists of an affidavit and billing records submitted by Loeschen and an affidavit submitted by counsel for DAV. [RP 3399-3415, 3438-39] We did not order that testimonial evidence be taken in any particular form. Our goal was to obtain findings of fact and conclusions of law sufficient to permit review. We propose to rule that the findings and conclusions submitted by the district court adequately satisfy our intent in remanding the case. [RP 3492-3522] In findings of fact numbers 1-24, the district court set forth the history of Butler/Richardson's efforts in the case and its negotiation of a proposed settlement for $300,000, the same amount Plaintiff ultimately agreed to with different attorneys. See, in particular, finding number 20-A, detailing such efforts over three-and-a-half years as having filed over 200 pleadings and responded to 10 motions for summary judgment. [RP 3492-3500] In conclusions of law numbers 14-21, the district court pointed out that

Plaintiff admitted to the existence of the fee agreement. The court also cited *Robison v. Katz*, 104 N.M. 133, 717 P.2d 586 (1986), for the proposition that an attorney may assert a charging lien even though he or she is not the party's current attorney at the time a fund is obtained from the attorney's efforts. [RP 3519-21]

"Because a court exercises its equitable powers in enforcing an attorney's charging lien, it may inquire into the reasonableness of the asserted fee for purposes of enforcing the lien." *Northern Pueblos Enterprises v. Montgomery*, 98 N.M. 47, 49, 644 P.2d 1036, 1038 (1982). We propose to hold that the fee amount ultimately awarded to Butler/Richardson was reasonable. First, Plaintiff signed a contingency fee agreement for 45% of the proceeds. Butler/Richardson's fee, had they been Plaintiff's sole attorneys and obtained the $300,000, should have come as no surprise to Plaintiff. The district court's rationale in initially allowing Butler/Richardson's lien in full in the order of September 21, 2005 was apparently that they had done essentially all of the work. This was not entirely correct, as Plaintiff had not yet agreed to the $300,000 settlement at the time they withdrew, nor had work been done on finalizing the details of the settlement and otherwise bringing the case to an end. Our concerns in this regard are adequately resolved, however, by Butler/Richardson's eventual agreement in the August 16, 2006 final order to settle for a total of $126,698.47 (i.e., $92,850.47 in the final order plus $33,848 previously

paid), substantially less than the lien amount of $142,000. Accordingly, the attorney fee paid to Butler/Richardson was reasonable in the circumstances.

Under the August 16, 2006 final order agreed to by DAV, Butler/Richardson, and Hollington/Loeschen (but not by Plaintiff), the district court recognized that Plaintiff had previously been awarded and paid $130,452.60 of the $300,000 settlement. The remaining $169,547.40 was to be divided as follows: $26,700.52 to DAV, $92,850.47 to Butler/Richardson, and $49,996.41 to Hollington/Loeschen. [RP 3639-41] Plaintiff's docketing statement does not reveal the source of the $62,756.60 figure cited as Plaintiff's net recovery. [DS 5] Presumably it arises from subtracting the $33,848 attorney fees Plaintiff previously paid to Butler/Richardson, and fees and costs paid subsequent to Hollington/Loeschen's withdrawal, from the $130,452.60 paid to Plaintiff.

Plaintiff's rather small net recovery of (according to the docketing statement) $62,756.60 appears to be in large part of his own making. The district court found that he had acted in bad faith in failing to produce documents that tended to show that he had reneged on the settlement. The district court found that Butler/Richardson's withdrawal was reasonable. See conclusion of law number 19. [RP 3521] According to Loeschen's affidavit filed on July 16, 2004, in Loeschen's initial discussions with Plaintiff he advised that "the best thing for him to do was to patch up his relationship with his previous attorneys," i.e., Butler/Richardson. [RP 3400] At the

time he entered his fee agreement with Loeschen, Plaintiff was on notice that there were outstanding fees due to Butler/Richardson. Plaintiff does not cite any authority, nor do we find any, for the proposition that reasonableness of attorney fees necessarily bears any relationship to the amount recovered. This Court does not decide issues for which no authority is cited. *In the Matter of Doe*, 100 N.M. 764, 676 P.2d 1329 (1984); Rule 12-208(D)(5) NMRA. *See also Robison*, 104 N.M. at 135, 925 P.2d at 588 (stating "We observe the sad fact that the attorneys' fees claimed here far exceed, and thus consume the total amount to which the client is entitled.").

***Issue 4*:** Plaintiff argues that the district court should have allowed a contingency fee to Hollington/Loeschen to be calculated based on Plaintiff's net recovery after paying his first attorneys. Plaintiff cites no convincing authority for this proposition. In *Lozano v. GTE Lenkurt, Inc.*, 1996-NMCA-074, 122 N.M. 103, 920 P.2d 1057, cited by Plaintiff, the district court remanded the case for a determination of whether the attorneys had misappropriated client funds, and if so, to reduce their fee award by the amount misappropriated. *Lozano* says nothing about the proper number to be used as a starting point for calculating a subsequent attorney's contingency fee.

We also observe that the district court set aside Hollington/Loeschen's 45% contingency fee agreement, which would have resulted in an attorney fee of $135,000 had it been calculated from the $300,000 settlement. After applying for $88,975.74 in fees

based on quantum meruit, Hollington/Loeschen ultimately agreed to settle for $49,996.41, less than half of the amount they would have received had the contingency fee contract not been set the circumstances would suggest that Loeschen knew the case could be settled with comparatively little work on his part, and a 45% contingency fee agreement would likely be questionable. The inconsistency arose from DAV counsel's assertion that the likelihood of settlement for $300,000 had been discussed with Loeschen on June 30, 2000 in the course of preliminary inquiries Loeschen made of DAV about the status of the case before entering the fee agreement. In contrast, at a February 18, 2002 hearing, Loeschen denied that he ever knew any specific amount had been discussed until new settlement negotiations were undertaken in late 2000.

The district court's findings of fact and conclusions of law after remand, while not really explaining how the inconsistent representations came to be made before that court, adequately address our concerns about fiduciary duty. The district court, referring to the affidavits of both Loeschen and counsel for DAV, found that the $300,000 figure had been mentioned prior to the fee agreement, but the context was DAV counsel's assertion that the offer was off the table because of Plaintiff's refusal to go through with the settlement, and that counsel for DAV was not optimistic that the offer would again be available. See generally, finding of fact 28 and subparagraphs. [RP 3501-05]

Accordingly, we propose to affirm the order of the district court.

/s/ Michael E. Vigil
MICHAEL E. VIGIL, Judge